U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 March 2007

Case No: **2005-CAA-00017**

In the Matter of

HAROLD D. FISHER,
Complainant,

v.

SHRINER'S HOSPITAL FOR CHILDREN,
Respondent.

RECOMMENDED DECISION AND ORDER

This proceeding arises under the Clean Air Act, 42 U.S.C.A. Section 7622 (hereinafter "the Act"), and implementing regulations at Title 29 Code of Federal Regulations Part 24. The Act states in pertinent part:

No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,

(2) testified or is about to testify in any such proceeding, or

(3) assisted or participated or is about to assist or participate in any manner is such a proceeding or in any other action to carry out the purposes of this chapter.

42 U.S.C.A § 7622. The statute is implemented by regulations providing procedures for handling of discrimination complaints. 29 C.F.R. § 24. An employee who believes that he or she has been discriminated against in violation of the Act may file a written complaint within 30 days after the occurrence of the alleged violation. 29 C.F.R. § 24.3(b), (c).

Shriner's Hospital for Children (SHC) (hereinafter "Respondent"), moves for summary decision on a complaint filed by Harold D. Fisher (hereinafter "Complainant"), based on the grounds that the complaint is time barred. Complaint concedes that the complaint was untimely filed, but argues that equitable tolling should be applied. For the reasons stated below, the Court finds no adequate basis in the record for tolling the 30-day filing period. Therefore, the undersigned finds that summary judgment for Respondent is appropriate.

ISSUE

Whether Respondent's motion for summary decision to dismiss the complaint as untimely should be granted or, alternatively, whether the Court should apply the doctrine of equitable tolling and, therefore, find the complaint timely filed.

FACTS

The Complainant was terminated from his employment with the Respondent on December 12, 2004.

On August 17, 2005, Complainant transmitted a letter to the United States Department of Labor, Occupational Safety and Health Administration (hereinafter "OSHA"). The Complainant alleged that he was discharged form employment on December 15, 2004, as a result of engaging in activities which are protected pursuant to Section 322(a)(1-3), of the Clean Air Act, 42 U.S.C. 7622; Section 507(a) of the Federal Water Pollution Control Act, 23 U.S.C. 1367; Section 7001(a) of the Solid Waste Disposal Act, 42 U.S.C. 6971; or Section 23(a)1-3) of the Toxic Substances Control Act, 16 U.S.C. 2622.

In late August 2005, the Regional Administrator of the Occupational Safety and Health Administration held that the complaint was not timely filed.

Thereafter, the Complainant filed an appeal with the Office of Administrative Law Judges and this case was assigned to the undersigned Administrative Law Judge.

A conference call was held with the parties on January 11, 2006. The Respondent was unwilling to waive the time limits on the filing of the complaint.

On January 12, 2006, the undersigned issued an order directing the Complainant to respond as to the timeliness of his complaint. He was directed to provide his responses to the Respondent and to this office.

The Complainant did provide a response but to this office only.

Subsequently, the lack of notice to the Respondent was discovered as the Court was awaiting a response from the Respondent.

On February 6, 2007, an Order was issued which left the record open for position statements. (A copy of the Complainant's response in February 2006 was furnished to the Respondent).

In correspondence in September 2005, the Complainant stated that he did not know that there was a time limit for filing. Also, he had tried to handle the matter through the Shriner's Organization. The Complainant included a letter that presumably was written in February 2005.

In February 2006, the Complainant stated:

> 1. The late filing of my complaint was because I was unaware that there was a time limit,
>
> And
>
> 2. I had attempted to handle this situation through the Shriner's Organization. When I received no response to my letters or calls, I decided to seek outside assistance.

In March 2007, the Complainant stated:

> I respectfully request that this case be kept open. Please keep me informed of progress and of any further information you may require from me.

In March 2007, Counsel for the Respondent stated, in part:

> … this matter should be dismissed in favor of SHC. The closure of this matter by the Department of Labor is supported by the following facts:
>
> 1. Complainant did not timely file his discrimination complaint, and has not submitted any substantive evidence to support why his failure to timely file should be excused;
>
> 2. The Complainant has not alleged that he engaged in any activity which is covered or protected as a Whistleblower under any of the laws or statutes under the jurisdiction of the U. S. Department of Labor, including but not limited to Section 322(a)(1-3), of the Clean Air Act, 42 U.S.C. 7622; Section 507(a) of the Federal Water Pollution Control Act, 23 U.S.C. 1367; Section 7001(a) of the Solid Waste Disposal Act, 42 U.S.C. 6971; or Section 23(a)1-3) of the Toxic Substances Control Act, 16 U.S.C. 2622;
>
> 3. SHC had legitimate, non-discriminatory business reasons for investigating Mr. Fisher's failure to follow internal Hospital policy.

ANALYSIS

As stated *supra*, the Act requires that a written complaint be filed within 30 days of the discrimination or termination, Section 24.3(b) of the regulations clearly state,

> Any complaint shall be filed within 30 days after the occurrence of the alleged violation. For the purpose of determining timeliness of filing, a complaint filed by mail shall be deemed filed as of the date of mailing.

29 C.F.R. § 24.3(b). The regulations further state,

> No particular form of complaint is required, except that a complaint must be in writing and should include a complete full statement of the acts and omissions, with the pertinent dates, which are believed to constitute the violation.

Since it is undisputed that Complainant's complaint was not filed until the 30 days has passed from the date of termination, December 12, 2004, summary judgment for the Respondent should be granted unless the Act's 30-day filing period is tolled.

APPLICABLE STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Under the Rules for Practice and Procedure for Administrative Hearings, any party may "move with or without supporting affidavits for a summary decision on all or any part of the proceeding." 29 C.F.R. § 18.40(a). A party opposing the motion may not rest on the mere allegations or denials of the motion but must "set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c); Peppers v. Coats, 887 F.2d 1493, 1498 (11th Cir. 1989) (stating that when "a nonmoving party's response to the summary judgment motion consists of nothing more than mere conclusory allegations then the court must enter in the moving party's favor.") The court must view the facts, and all reasonable inferences drawn from those facts, in the light most favor to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). Summary decision is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317 (1986). While the court will not weigh the evidence, a mere scintilla of evidence will not suffice to defeat the motion. Johnson v. Fleet Fin., Inc., 4 F.3d 946, 949 (11th Cir. 1993).

The Courts' consideration of Respondent's request for summary judgment revolves around whether equitable tolling should toll the Act's filing deadline. If equitable tolling is an appropriate doctrine to be applied by the Court, then the complaint would be considered timely filed and summary judgment would be inappropriate.

DOCTRINE OF EQUITABLE TOLLING

The United States Supreme Court has recognized that a failure to comply with a short employment discrimination filing period if not a jurisdictional bar to maintaining a claim, and that the time limits by such statutes are subject to equitable modification. Zipes v. Transworld Airlines, Inc., 455 U.S. 385, 393 (1982) (holding that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling). Thus, the doctrine of equitable tolling of a statute of limitations can be applied under the whistleblower protection laws.

Equitable tolling applies in three principal situations: 1) Complainant has been misled by Respondent regarding the cause of action; 2) Complainant has been prevented in same way from asserting his or her rights; or 3) Complainant previously raised the precise statutory claim in issue but has mistakenly done so in an incorrect forum. See e.g., City of Allentown v. Marsh, 657 F.2d 16, 18 (3rd Cir. 1981); Smith v. American President Lines Ltd. 571 F.2d 102, 109 (2d Cir. 1978). There is no evidence or argument that Respondent misled Complainant or that Complainant was in some extraordinary way prevented from filing his complaint. Therefore, only the latter triggering condition may be a basis in this case for considering the applicability of equitable tolling.

Both administrative law judges and the Secretary of Labor have been reluctant in tolling the statute of limitations in whistleblower provisions. See e.g. Mitchell v. EG&G (Idaho), No. 87-ERA-22, recommended D & O of ALJ (April 20, 1987) (refusing to apply equitable tolling or constructive filing); Hicks v. Colonial Motor Freight Lines, No. 84-STA-20, D&O of SOL (Dec. 10, 1985). However, there have been instances where courts have found employees entitled to equitable tolling when they filed complaints in the wrong office of the Department of Labor or they mistakenly filed the complaint with the EPA. See, e.g. Thomas v. E. I. Dupont De Numours & Co., No. 81-TSC-1, Recommended D&O of ALJ (Dec. 17, 1980); Sawyers v. Baldwin Union Free Sch. Dist, No. 85-TSC-1, D&O of SOL (Oct. 5, 1988); Darty v, Zack Co. of Chicago, No. 82-ERA-2, D & O SOL (April 25, 1983).

In this instance, there exists absolutely no evidence or argument on the part of Complainant that the filed a written complaint with any agency within the 30-day filing period allowed by the Act.

There is some indication from the Complaint that in February 2005 he contacted an executive affiliated with the Respondent and an employee of the U. S. Department of Labor. Even if the above were accepted as true, these actions occurred beyond the thirty day period for filing an appeal.

EQUITABLE TOLLING AND A FORMAL HEARING

In cases in which the doctrine of equitable tolling is an issue, frequently the credibility of witnesses requires a formal hearing. In such cases, the administrative law judge must hold an evidentiary hearing on the tolling question.

In McGough, et al v. U. S. Navy, ROICC, No. 86 ERA-18/19/20 remand D & O of SOL (June 30, 1988), the Secretary of Labor considered an administrative law judge's dismissal of complainant's claim based on their failure to file within the 30-day filing guidelines. In McGough, no hearing was held, and the administrative law judge based his decision on both parties' briefs and the attached exhibits. In her Remand Decision and Order, the Secretary considered the administrative law judge's decision to reject the complainants' arguments for equitable tolling to prevent dismissal of their claim. In McGough, however, the complainants' date of termination or discrimination was a contested issue, thereby putting into question when the 30-day filing deadline began. The Secretary stated,

> Complainants' equitable arguments raise significant factual issues which should have been decided through a hearing involving the testimony of witnesses and the presentation of evidence. Courts are reluctant to decided equitable tolling issues in the context of summary decision, such as the procedure used in this case, because these issues frequently involve the credibility of witnesses.

McGough, No. 86 ERA-18/19/20 remand D&O of SOL (June 20, 1988) (citations omitted). Therefore, it is necessary for this Court to determine whether summary decision without a formal hearing is appropriate, given the nature of most equitable tolling arguments and their bases in the credibility of witnesses.

This case is distinguishable from McGough in that there exists no genuine issue of material fact. In McGough, the Secretary determined that there existed a genuine issue of material fact regarding the exact date the act of discrimination had occurred. Accordingly, the Secretary remanded the case to the administrative law judge for a full hearing to determine the timeliness of each complaint. McGough, No. 86 ERA-18/19/20 remand D & O of SOL (June 30, 1998). In this case, considering all Complainant's assertions as true, there exist no basis for tolling the filing deadline. Complainant does not allege that he filed a federal claim of any sort during the 30-day deadline, but rather argues that he attempted on several occasions to make contact with the Respondent and with agency personnel some sixty days after his dismissal.

CONCLUSION

Based on the foregoing, and having given Complainant the benefit of all reasonable doubt with respect to the evidence on which he relies, I find that the 30-day statue of limitations should not be tolled and that the Clean Air Act complaint filed by Complainant was untimely under the Act and the regulations at 29 C.F.R. Section 24.

In conclusion, the Court finds there is no genuine issue as to any material fact regarding the timeliness of the complaint. Therefore, Respondent's motion to dismiss the complaint as untimely shall be granted as a matter of law.

RECOMMENDED ORDER

It is hereby **ORDERED** that the complaint filed by Harold D. Fisher be **DISMISSED** as untimely.

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/dlh
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("ARB") within ten (10) business days of the date of issuance of the administrative law judge's Recommended Decision and Order. The Board's address is: Administrative Review Board, U. S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Suite 400-North, Washington DC 20001-8001. *See* 29 C. F. R. § 24.8(a). You must also serve copies of the Petition and briefs on the Assistant Secretary, Occupational Safety and Health Administration and Associate Solicitor, Division of Fair Labor Standards, U. S. Department of Labor, Washington DC 20210.

If no Petition is timely filed, the administrative law judge's recommended decision becomes the